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**OFFICE OF PETITIONS**

In re  
O'Connell, et al.  
Application No. 09/954,677  
Filed: September 15, 2001  
Attorney Docket No. 061300-0242

: DECISION ON APPLICATION  
: FOR PATENT TERM ADJUSTMENT  
:  
:

This letter is in response to the "APPLICATION FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(b)", filed June 24, 2005. Applicants request that the initial determination of patent term adjustment under 35 U.S.C. 154(b) be corrected from zero (0) days to six hundred forty-three (643) days.

The application for patent term adjustment is DISMISSED.

On March 30, 2005, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above identified application. The Notice stated that the patent term adjustment (PTA) to date is zero (0) days. On June 24, 2005, Applicants

timely<sup>1</sup> submitted an application for patent term adjustment, asserting that the correct number of days of PTA at the time of the mailing of the Notice of Allowance is six hundred forty-three (643) days.

The Office initially determined a patent term adjustment of zero (0) days based on an adjustment for PTO delay of six hundred forty-three (643) days, pursuant to 35 U.S.C. 154(b)(1)(A)(i) and 37 C.F.R. §1.703(a)(1), reduced by eight hundred thirty-five (835) days of Applicant delay pursuant to 37 C.F.R. § 1.704(c)(3).

A review of the record reveals that Applicants were properly assessed applicant delay pursuant to 37 C.F.R. § 1.704(c)(3). A Notice to File Missing Parts was mailed on October 16, 2001. Applicants failed to timely reply. Accordingly, the application became abandoned on December 17, 2001. A petition to revive was first filed on January 9, 2004, and was finally granted in a decision mailed on April 30, 2004.

Applicants state that the Office mailed a Withdrawal of Previously Sent Notice on July 29, 2004, indicating that the Notice of Abandonment mailed on November 10, 2003 was mailed in error. However, a review of the application file fails to reveal the presence of that paper. The application file is the official file of record. An applicant alleging the presence of a paper not contained therein bears the weight of that allegation by a preponderance of the evidence.

37 C.F.R. § 1.704(c)(3) states:

(c) Circumstances that constitute a failure of the applicant to engage in reasonable efforts to conclude processing or examination of an application also include the following circumstances, which will result in the following reduction of the period of adjustment set forth in § 1.703 to the extent that the periods are not overlapping:

(3) Abandonment of the application or late payment of the issue fee, in which case the period of adjustment set forth in §1.703 shall be reduced by the number of days, if any, beginning on the date of abandonment or the date after the date the issue fee was due and ending on the earlier of:

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<sup>1</sup> Applicant filed the application for patent term adjustment on the same date as the issue fee.

- (i) The date of mailing of the decision reviving the application or accepting late payment of the issue fee; or
- (ii) The date that is four months after the date the grantable petition to revive the application or accept late payment of the issue fee was filed; (emphasis added)

Therefore, Applicant should have been assessed delay for the period from December 17, 2001 (the date the application became abandoned) to April 30, 2004 (the date of mailing of the decision reviving the application), or 865 days, not 835 days.

In view thereof, the correct determination of patent term adjustment is **zero (0) days** (643 days of PTO delay, reduced by 865 days of applicant delay).

Receipt of the \$200 fee under 37 C.F.R. § 1.18(e) is acknowledged.

The application file is being forwarded to the Office of Patent Publication for timely issuance of the patent.

Telephone inquiries specific to this letter should be directed to Cliff Congo, Petitions Attorney, at (571)272-3207.

*Karin Ferriter  
filed*

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